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IN THE

SUPRME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

No. 961

WILLIAM HETTLEMAN, PALMER D. EDMUNDS,
and J. EDWARD JONES,

Appellants,

VS

THE CHICAGO LAW INSTITUTE, etc., et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF ILINOIS

REPLY TO MOTION TO DISMISS
OR AFFIRM JUDGMENT

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This Reply will follow the Appellees' topical sequence: (Jurisd. State. meant where refer. to main brief -too late to correct)

OPINIONS AND ORDERS BELOW

Appellees' Motion, p.2, second sentence, fails to note that appellants sought review also (appellants' main brief 13, bottom, 44-45) under the Illinois Supreme Court Rule 29 (When the practice was revised January 1, 1967, this Rule and the Illinois C.P.A. s. 76(1) to which it conformed were repealed, and replaced by Rule 303, but they still applied to cases then pending according to a prefatory by the Illinois Supreme Court to the New Rules).

The same omission was made on the same page, 2d paragraph, 4th line from bottom thereof; on the same page, 3d paragraph, 2d line thereof; and on pages 9-10 in their Statement. This Rule 29 (Appendix F9b, pp. 45a-46a) is the one year rule, permitting a party who did not file his Notice of Appeal timely, or filed a defective Notice of Appeal timely, to petition the appellate courts for leave to file an appeal by showing he had a meritorious case and had not been guilty of culpable negligence. It is important in this case for two reasons: (1) the appellees' studious reference omission may create the impression that appellants' petitions for leave to appeal in the appellate courts were denied for failure to comply therewith; (2) appellees did, and do, thereby suppress the fact that they, themselves, failed to comply with Rule 29 by submitting typed, instead of printed Answers to appellants' petition to the Illinois Appellate Court for leave to appeal under both sec. 76(1) of the Civil Practice Act and under Supreme Court Rule 29. Appellants' main brief, p. 45, noted this dereliction which was in the same category as the alleged dereliction of appellants in non-compliance with Rule 35. Appellees' dereliction in non-compliance with a procedural rule was indisputable. The alleged appellants' dereliction

as will soon be demonstrated beyond peradventure at page 26 of this Reply, did not even exist because Rule 35 did not exist legally, and, at most, was highly doubtful. In truth, both derelictions were miniscule. Appellees have raised a tempest in a teapot.

2. Appellees' Motion, p. 2, 1st paragraph, lines 7-8 state that a copy of the Final Decree of July 13, 1966 was not included in appellants' Appendix. The impression sought to be created may be that appellants have kept it from this Court. Appellants' main brief, p. 2, states that the trial court's opinion appeared in the Record, Document No. 2, at pp. 137-39. This Court could hardly miss the Decree at pp. 132-33 of that Doc. 2, known as Abstract of Record in the trial court. To have included the Decree in the appellants' Appendix may have violated this Court's Rule 15(1)(a) requiring reference to opinions only. Rule 15(1)(b)(ii) required reference only to dates of orders sought to review. Why impose needless duplicative material on this Court?

3. Page 2, paragraph 2, last sentence, states that the appellants' Appendix contained no reference to certain orders of the Illinois Appellate Court on February 20, 1967 and of the Illinois Supreme Court on May 17, 1967. Rule 15

does not require their inclusion in the Appendix. Such inclusion would also have burdened this Court with needless duplicative materials, since reference was made in the appellants' main brief to the Record where the original orders may be found. (Appellants' main brief 45 refers to the Appellate Court order of February 20, 1967 as being Doc. 3 of the Illinois Supreme Court Record in #40603 transmitted by its Clerk to the Clerk of this Court. Appellants' main brief 47-49 discusses fully the Hettleman-Edmunds Petition and Supplemental Petition for leave to appeal to the Ill. Supreme Court, the denial thereof, and Motion to Reconsider, referring to the Record there in #40603 where the order of May 17, 1967 appears clearly as Doc. 8 in the Index to Documents transmitted to this Court.)

JURISDICTION

Page 3, 2d paragraph, last sentence thereof, referring to the in rem proceeding under Ex Parte Young, 209 U.S., filed July 1, 1966 in the Chicago federal court, misrepresents the true holding. No. 962 in this Court is the companion and sequential Petition for Certiorari

to the Seventh Circuit to determine if the true holding, that Title 28 U.S.C. s. 2283 and Dombrowski forbade the relief prayed to enjoin state officers from interfering with the peacable enjoyment of their workshop, by the Institute and its members, is sound. Quo warranto was filed in the Circuit Court of Cook County, on December 1,1966, to inquire by what authority / Cook County and its conspirators among unfaithful members of the Institute's Board transferred the Institute library of about 150,000 volumes, including rare and out-of-print books, having a replacement cost of about $2,000,000, to the 29th floor of the Civic Center, Chicago and are maintaining and operating it as though this Court had already dismissed the appeal or affirmed the decree of July 13,1966, in violation of the dignity and authority of the Circuit Court of Cook County and its order of August 22,1966, construing the last page of Exhibit C, the donative contract attached to the Complaint in 65 CH 6863(Abs. 46), to permit physical "relocation""provided that operation of The Chicago Law Institute be continued in the same manner as prior to the entry of the decree, until said decree is affirmed or dismissed"finally(i.e., under the management and control of its members and its duly

elected officers and managers). Direct appeal has been taken to the Illinois Supreme Court from the trial judge's order denying the petition for leave to file the complaint, after taking over 5 months to decide the legal sufficieny of the petition, without opinion. Oral argument will be heard on March 25, 1968 in the Illinois Supreme Court on whether Cook County et al have usurped the Institute's franchises and the members rights therein. It is anticipated that, as heretofore, the appeal will be denied by the entry of an order without comment or opinion, in which case a review will be sought in this Court.

It may be approriate here also to advise this Court of another direct appeal to the Illinois Supreme Court from an order of the Circuit Court of Cook County, denying a petition for mandamus, filed April 14, 1966, to compel the president and secretary of the Institute to call an annual meeting of the Institute which they have refused to do in 1966, 1967, 1968 in order to strangle the Institute financially, and manufacturing the evidence to support the allegation in their Complaint that it is not, or will not be, possible for the Institute to continue. The ostensible reason, an afterthought, is

that the appellees wish to preserve the statusquo till this Court will dismiss this appeal or affirm the decree of July 13,1966. The trial court granted about 13 continuances in about as many months,till the plaintiff pleaded for denial of his petition so an appeal could be taken from his order grounded on the view that,the decree, having in effect dissolved the Institute,an annual meeting of the members would be useless. This order was entered by Charles S. Dougherty,J., one ofthe 4 judges who signed the 1963 judges' report(Appellants' main brief 21). Assessments are levied on the Institute members at each annual meeting on the last Friday in January to support the Institute -its sole support. Oral argument will be heard on March 27,1968 in the Illinois Supreme Court on whether the members have been deprived of their sacred right to vote and participate in the Institute corporation's affairs. It is anticipated that,as heretofore, the appeal will be denied by the entry of an order without comment or opinion,in which case review will be sought in this.Court.

This Court may wish to postpone consideration of the pending appeal and petition for certiorari(Nos. 961 and 962) to consolidate them with the quo warr-

anto and mandamus cases, under the Supremacy Clause.

STATUTES INVOLVED

The Illinois C.P.A.,s. 76(1), does not square with the same section in Appellants' Appendix F8,pp. 44a-44b, in that the former had been amended in 1965 to take effect soon after the suit in 65 CH 6863 was filed on December 10,1965,reducing the time in which to file a Notice of Appeal from 60 days to 30 days. This inexcusable lapse,as well as some above noted, and to be hereafter noted, seems to indicate a hasty reading, not a careful study, of appellants' main brief.

QUESTIONS PRESENTED

Further errors of commission and omission will be pointed out in analyses of the Statement and Argument.

STATEMENT

Page 8,line 6. The Complaint (Abs. 1) filed in 65 CH 6863 was not for a declaratory judgment. It prayed "A. That this court approve the agreement" and to restrain action by the defendants in any other fori or calling the annual or special meeting. The plaintiffs in said suit never dared press for injunctions under such prayer. No briefs were ever filed before the trial court,unless affidavits in support

of motions be called "briefs", but oral arguments were held, especially on Jones' Amended Motion to Dismiss the Complaint, after which the motion was denied without comment.

Page 8, last 2 lines and top of p. 9. The Exhibit C, the donative contract attached to the Complaint, did not use "turn over". Appellees deliberatley use this phrase to avoid the use of the word "transfer"(Abs. 46) whose construction by the trial judge in his August 22,1966 order (see p. 5 of this Reply) is challenged in the quo warranto appeal to the Illinois Supreme Court.

Nor did Exhibit C state the Institute library was to be a"nucleus" for a county law library. The Institute's library of 150,000 volumes is a ready-made one that took 100 years to collect, at a total cost estimated at $5,000,000. It ranks among the 15 largest law libraries in the world, barring a handful of leading law school libraries.

Exhibit C, attached to the Complaint in 65 CH 6863, (Abs. 41) refers to the Cook County December 11,1962 proposal(Appellants' Appendix F2, p. 42a) to call the "donated" library The Chicago Law Institute Library of Cook County. The 1963 judges' report(Abs. 67, bottom,)

also refers to such proposal. In practice, the Institute's library, now "relocated" on the 29th floor of the Civic Center, Chicago, is named the Cook County Law Library. All identity of the Chicago Law Institute has been removed. Its phone has been discontinued, so that it is hard to reach its members there. Cook County now employs over 40 people, including former Institute employees, on a budget of over $500,000 yearly. The personnel increase noticeably as elections approach. On an annual budget of $80,000 the members provided the payroll for a Librarian, an Assistant Librarian, secretary, and 4-5 page boys which consumed ½ the budget. The other $40,000 paid for new books and the repair of old ones.

Page 9, first paragraph, is misleading in some respects. The alleged non-compliance decisions referred to will be treated more approriately under Points II and III of the appellees' Motion to Dismiss, where it will be demonstrated that the denials referred to must have been based necessarily on a consideration of the federal questions, in which case this Court can review them.

A misleading inference may be created by failure

to quote fully, in the middle of the page, (2) from the C.P.A,sec. 76(appellants' Appendix F8,pp. 44a-45a). Appellants filed their Notice of Appeal in the trial court within the 30 day statutory period,which was timely and perfected the appeal,according to sec. 76(2), and they prosecuted their appeal by serving a copy of their Notice of Appeal directly to each co-defendant and on each adverse party within the time specified in Rule 34(appellants' Appendix F9,p. 47a),and filed their praecipes in accordance with the law,none of which the appellees have denied. Sec. 76(2) stated that no step after filing their Notice of Appeal was jurisdictional,and sec. 4 of the C.P.A. states construction of rules made pursuant to the Act,under sec. 2 thereof, shall be liberal that the substantive rights of the parties be determined(Appendix F8,p. 44a).

On page 8,3d sentence,the statement is made that a ground for the application of cy pres was the inability of the Institute to meet competition from a free,public law library,since the Institute members would not be willing then to pay assessments. Since Cook County had no real or comparable library to the Institute's which took 100

years and $5,000,000 to accumulate, a wrong impression is created that such competition was imminent. Reference has been made already to the fact that the appellees, by refusing to call annual meetings to levy assessments for the Institute's support, were manufacturing a situation of financially inability to carry on, as an additional ground for cy pres. It shocks the conscience, moreover, that, to attain its objective to take the Institute library for a public use without compenastion, Cook County and its confederates can be permitted by this Court to say: "If you do not submit and surrender your library, we will set shop next to you and, by free service, drive you out of business." Would this Court for one moment sanction the conduct of a large and financial resourceful industrial corporation asking its competitor to merge, and, if it refuses, to drive it to the wall by reducing its prices or giving away its goods? To ask a court of equity to apply cy pres, that is precisely the argument appellees advanced to the chancellor.

The above correctional remarks apply equally to the same terms, about failure to prosecute the appeal, used by the appellees as to Jones.

ARGUMENT

I.

Non-compliance with Rule 15(1)(d) and (e) in appellees' Motion to Dismiss is charged at pp. 11-12. The substance is that the Jurisdictional Statement did not state at what stages in the trial and appellate courts, the manner, method, the way the federal questions were raised, and no reference was made to the record that would confer jurisdiction on this Court. It is, therefore, necessary to summarize or recapitulate a whole section, pp. 30-51 of the appellants' main brief, "How The Constitutional Questions Were Raised in the State Courts." How the appellees could so conclude in the face of minutiae, fully documented, in that Section is hard to understand. To meet the charge will expand this Reply beyond the original intent.

The Section divided the scenes into what took place in the trial court, in the Illinois Appellate Court, and in the Illinois Supreme Court, at what stage, by what documents, and where they appear in the Record, as to each major defendant, Jones, Black et al, and Hettleman-Edmunds.

In the trial court, Jones raised in the petition for change of venue from O'Brien, J. denial of procedural due process (Jones R. 40,788) contrary to the 14th amend.

In his Amended Motion to Dismiss the Complaint, he raised the nature of the Chicago Law Institue corporation and the deprivation of his substantive rights under its charter by a conspiracy, using the amendment, in 1963, to the County Law Library Act, c. 81, s.81, to deprive the Institute and its members of their property contrary to the 5th and 14th amendments (Jones R. No. 40788, pp. 60-69, 125, 132-160, 178-79, 64-67; appellants' main brief 30-33). In his later Motions to Strike the affidavits supporting the plaintiffs' vacuous motion for summary judgment, B-e attacked Cook County's implementary ordinance of June 17, 1965 (Appendix F5, pp. 42a-43a) as state action. At B-g, he contended that the said 1963 amendment to c. 81, s. 81, if permitted to accomplish its purpose would constitute a denial of due process (Jones R. 40788, pp. 252-59; main brief 34). Quotationswere made from his later motion.

In the trial court, the Black et al. Answer, adopted by appellants Jones and Edmunds, attacked the constitutionality of the November 23, 1965 Cook County implementary ordinance (Appendix F6, p. 43a), paragraph 14 setting out 12 counts in a bill of particulars the

details of the conspiracy to deprive them of their personal and property rights. Quotation was made from their Answer.(main brief33-34).

In the trial court,Hettleman's proffered counter-affidavit at the hearing on the plaintiffs' motion for summary judgment and in opposition thereto was not permitted to be filed,contrary to established statutory and decisional law which constituted a denial of his constitutional right to due process of law. The main brief omitted to state that the trial judgealso denied him certification of the report of proceedings,because it was expected his Notice of Appeal would be dismissed. That deprived him of part of his record and of due process. This may be considered properly as a subsidiary question fairly within Cle) on p. 9 of the main brief.

O'Brien,J's Opinion(Appendix A,pp. 1a-3a) speaks for itself. It shows amply that the federal questions were presented to him fully,that he considered them, and found them without merit.

In the Illinois Appellate Court,Hettleman and Edmunds resisted vehemently the plaintiffs' motion to dismiss their appeal as feigned and baseless and so

a denial of due process in not affording them an opportunity to be fully heard. Pages 38-39of appellants' main brief sets out their grounds fully. The subject will be treated again in the analyses of the appellees' main brief, Points I and II.

In the Illinois Appellate Court, the Black et al. Brief and Argument presented every federal question now being presented to this Court, although not in the same form or words. Pages 41-43 summarizes the arguments. They spelled out the Institute's charter, the Institute's and the members rights, franchises, privileges and immunities. The trial court's holdings and the errors therein were exposed in the minutest detail. His lack of jurisdiction over the the subject matter and over the parties was demonstrated. If true, all proceedings have been null and void, and any discussion as to non-compliance with Rule 35 would be moot. Dartmouth College principles and their affirmation in Washington Home, 157 Ill. 414 were called to the Appellate Court's attention at pp. 26-28 of the Black et al. Brief and Argument(Hettleman-Edmunds Record in #40603, Ill. Supreme Court, Doc. 4 of Index of Docs. transmitted to this Court).

In the Illinois Appellate Court, the printed petition of Hettleman and Edmunds in #51,962, for leave to file their Notice of Appeal within 1 year of the July 13, 1966 decree (C.P.A. sec. 76(1) and Rule 29)(Appendix F8, pp. 44a-44a; F9, pp. 45a-46a), the Black et al. Brief and Argument(Doc. 4 of Index of Docs. transmitted to this Court in the Hettleman-Edmunds Record #40603 in the Ill. Supreme Court), as corrected, were again before it. The Petition itself showed that the members had distributive rights upon dissolution which the appellees contend they have not, and in which O'Brien, J's Opinion so held; and that the Institute charter, which that Opinion construed to be a private corporation originally altered into a charitable corporation by the 1907 amendment thereto, remained unaltered by that 1907 amendment to sec. 2 of the charter (Doc. 3 of Index to Docs. transmitted to this Court includes that Petition as part of the Record in #51,962 in the Appellate Court).

In the Illinois Supreme Court, taking no chances due to Parker v. Ill., 333 U.S. 571, cited on p. 17 of the appellees' Motion to Dismiss, Jones appealed directly to that Court in 40,154, under Rule 28-1(Appendix F9,

p. 45a). The 1962 amendment to Article VI of the Ill. Constitution, effective Jan. 1,1964, permits appealeto the Appellate Court without waiver of any constitutional questions on later appeal from its judgment to the Ill, Supreme Court. Jones' appeal was dismissed,on September 15,1966, before the trial court record could be brought before it pursuant to his praecipe duly filed. The trial court record,as just demonstrated, had presented the federal questions now presented to this Court,and had been considered there to be without merit. On the basis of the Ill. Supreme Court action on Jones, the Appellate Court followed suit immediatly by dismissing the appeal of Hettleman and Jones,on September 20,1966. Jones' affidavit,attached to his appeal,did adopt the Black et al Answer (Abs.51-74 in Doc. 2 of Index to Docs. in Hettleman-Edmunds Record #40603 transmitted to this Court). That Answer did present the fedral questions review of which is asked here(appellants' main brief4-10,33-34,41-44,46-47;their Reply herein,at pp. 14-15,16).

In the Supreme Court of Illinois,the Black et al. appeal in 40,483 presented the points and authorites

they presented to the Appellate Court in #51,619. Their petition for leave to appeal to that Court did raise unmistakably and clearly denial to them of due process of law and violation of the contract clause. (appellants' main brief 46-47; their reply herein 16).

In the Illinois Supreme Court, Hettleman and Edmunds presented the full Black brief and argument, as corrected (Doc. 4 of Index to Docs. transmitted to this Court), Their Petition, and Supplementary Petition, for leave to appeal (Docs. 1 and 6 of the Index to Docs.) and their Motion to Reconsider (Doc. 10 of said Index) presented to the Ill. Supreme Court ad nauseam the federal questions set up on pages 4-10 of the appellants' main brief. in Records #40483, #40603; #40903 (quo warr.); 40788, In opposing the appellants' efforts there, appellees argued persistently that the Appellate Court had gone into the merits of the federal questions presented to it and found them without merit, and in this Court they argue that this was not so, the decision in the appellate court having rested solely on non-compliance with Rule 35.

In opposing the Black et al. petition for leave to appeal from the Appellate Court, in #40483, the Answer of plaintiffs-respondents, the Institute, Arkema and O'brien, stated, at p.24 thereof:

"The record shows that the questions before the Appellate Court were in every case fully briefed and thoroughly considered before any determination was made by that Court."

In opposing the Hettleman-Edmunds petition for leave to appeal from the Appellate Court, in #40603, the Answer of plaintiffs-respondents, the Institute, Arkema and O'Brien, stated at pages 7-8 (Doc. 7 of Index in Record #40603 before this Court):

"...the questions raised by the Petition of WILLIAM HETTLEMAN and PALMER D. EDMUNDS are identical to the questions which had been raised by the petition of the clients represented by Attorney IRVING BREAKSTONE and which the Supreme Court determined adversely to those Defendants-Petitioners in Case No. 40483 on March 28, 1967. The questions are as follows:

1. Is the Chicago Law Institute a charitable and educational institution?

2. Was the Circuit Ct. of Cook Co. correct in applying cy pres in Case No. 65 CH 6863?

3. Did Plaintiffs-Respondents have capacity to file Case No. 65 CH 6863 seeking declaratory judgment?

4. Was the Circuit Ct. of Cook Co. correct in holding that the members did not have a property interest in the assets of the Chicago Law Institute?

5. Were the State's Atty. and the Atty. Gen. properly made parties defendant in Case No. 65 CH 6863?

6. Was the Circuit Ct. of Cook Co. correct in granting summary judgment in favor of Plaint-

iffs-Respondents?

7. Was the Appellate Court correct in dismissing the appeal of Defendants-Petitioners?

8. Was the Appellate Court correct in denying the Petition of Defendants-Petitioners for leave to file notice of appeal under former sec. 76(1)?

"Plaintiffs-Respondents respectfully submit that the foregoing questions are answered affirmatively, and that it follows that Defendants-Petitioners have made no showing whatever to warrant the Supreme Court in granting them leave to appeal."

In affirming, the Illinois Supreme Court must have reviewed whether the decisions of the trial and Appellate Court rested on federal as well as non-federal grounds.

In opposing the Jones' petition for leave to file his Notice of Appeal under the 1 year rule, in 40788, the Answer of plaintiffs-respondents, the Institute, Arkema and O'Brien, stated at pp. 7-8 that each of the foregoing questions were answered affirmatively by the trial judge. At p.5, of the said Answer, denying there was any merit in Jones' federal claims, it was stated:

> "..this Court considered the grounds on which J.Edward Jones now relies to establish the meritorious nature of his claim for leave to appeal under s. 76(1). The determinations of this Court in Case Nos. 40483 and 40603 that appeals were not warranted in those instances are dispositive of J.Edw. Jones' claim to leave for appeal under s. 76(1) on the same grounds."

and at p.3:

> "b. In Case No. 51962,the Appellate Court had denied the petition of William Hettleman and Edmunds for leave to file Notice of Appeal under former s. 76(1). Denial of the petition was in PART on the ground of culpable negligence in failing to comply with Rule 35.
>
> "c. In Case No. 40603, this Court denied the Petition of Hettleman and Edmunds for leave to appeal from the judgment of the Appellate Court in Case No. 51962 denying the Petition for leave to file Notice of Appeal under former s. 76(1). Denial of the petition was in PART on the ground that dismissal of the appeal and denial of leave to appeal within a year were proper,absent compliance with Rule 35."

Appellants Hettleman and Edmunds applied to Mr. Justice Schaefer of the Supreme Court,in vacation, to stay its Mandate(Doc. 8 of Index to Docs.). He asked 2 questions:(1) What was the federal question this Court would be asked to review? He was told, when the appellees insisted that the only question was non-federal,failure to comply with procedural

Rule 35, that, for the reasons given him, as here, Rule 35 was wholly inapplicable, wherefore procedural due process had been denied. (2)Had this federal question been raised in the appellate courts? When told that it was, he caused an investigation to be made. Upon verification, he then entered the order staying the Mandate till this Court could review(Doc. 9 of Index to Docs.).

In their brief opposing appellants Hettleman and Edmunds' appeal to the Ill. Supreme Court from the trial court's order denying leave to file a complaint in quo warranto(see pp. 4-5 of his Reply), they attacked the interest alleged to be separate from that of all citizens, residents, taxpayers of Cook County, as follows:

> "The question of any pecuniary or ownership interest of plaintiffs-appellants in The Chicago Law Institute or its books or its other assets, deriving from their status as members of the Institute, has been determined adversely to William Hettleman and Thomas A. McManigal in Case No. 65 CH 6863 in the Circuit Court of Cook County."

One must conclude from the foregoing that the appellees' attempt to discredit the Jurisdictional Statement on the grounds asserted was frivolous.

Page 12,objection 6 to the Jurisdictional Statement, asserts no case was cited therein to sustain this Court's jurisdiction. It indicates that the appellees must have read the Jurisdictional Statement hurriedly and uncritically,or that their objections were made reckelssly. At page 3,last paragraph of appellants' Jurisdictional Statement, is cited page 655 of Dartmouth College which states that this Court has jurisdiction "here is drawn in question the validity of a statute... on the ground of their being repugnant to the constitution ...and the decision is in favor of their validity." What better authority could be cited when its principles apply to the case at bar which does not involve any charity even?

II and III

These two points are obverse of the same question really, whether the appellate court decisions could have rested on the alleged failure of appellants to serve someone with an intent to appeal separately no later than 10 days from service upon them by a signed advice by the attorney for the appellees, The Chicago Law Institute,Arkema and O'Brien, that appellants' co-party defendants,Black et al. had the day before,

on July 14,1966,served them with a Notice of Appeal.

That the non-federal question raised by the appellees is feigned has beendemonstrated on pages 37-41 of the Jurisdictional Statement. Further demonstration will be made,since it is now clear that federal questions were presented to the Illinois courts and decided to be without merit,as appellees have heretofore admitted on a number of occasions, that their decision rested necessarily on these federal questions.

The test laid down by this Court has been repeated ad infinitum in this Court's decisions. Adams v. Russell and the more recent Wolfe v. N.C., both cited by appellees, contain apt statements of it:

In Adams,it was stated,at p. 359, that,if a state court rested its decision upon an independent ground, "then it must appear that such ground was a good and valid one. Klinger v. Missouri,13 Wall. 257,263. Otherwise,as was said in Neilson v. Lagow,12 How. 98,110,

> 'counsel might raise on the record some point of local law,however erroneous,and suggest that the court below may have rested its judgment thereon'

and,therefore,if the independent ground be not good and valid, it will not be presumed that the judgment was based upon it. See also Maguire v. Tyler."

In Wolfe, it was stated, at p. 185:

> "It is well settled that a state court may not avoid decidi/federal questions, and thus defeat the jurisdiction of this Court, by putting forward nonfederal grounds of decision which are without any fair or substantial supprt."

All must agree that, if federal questions were presented to the Illinois courts in the case at bar, and the alleged non-federal question did not exist, or it was not within the competence of those courts to decide, then their decisions must have rested on a consideration of the federal questions only, unless they avoided them by using the non-federal question as a pretext. That precisely happened in the case at bar for the following reasons, in addition to the reasons advanced at pages 37-41 which will not be repeated.

The 1962 amendment to Art. VI, the Judicial Dept., of the Illinois Constitution, made clear that parties were to have appeal as of right, instead of discretion, where state or federal constitutional questions were involved, even though one went to the intermediate Appellate Court first.

The Illinois Civil Practice Act, enacted in 1933, granted the Supreme Court power to make rules of pleading, practice and procedure for the courts, if

they did not contravene its provisions. Rule 35 was made pursuant to such power. Appellees' contention has been that, by the "gimmick" it used for which there is not any authority even to be found in Rule 35, it could cut down appellants' time in which to serve an intent to appeal to less than the statutory 30 days. In the case at bar, they tried to cut it down to 12 days (service in Illinois is as of the date of mailing and not upon receipt). The Supreme Court's power did not permit it to change the C.P.A. s. 76(1) and (2) which were clear that a Notice of Appeal may be filed in the trial court as of right, and not by court discretion, no later than 30 days from the entry of the decree on July 13, 1966, or by August 12, 1966, whereupon no other step is jurisdictional and the burden is upon anyone who would upset that Notice of Appeal. The Supreme Court recognized it did not have the power make a Rule 35, as appellees have construed it, and tardily made Rules 301 and 303 (Appendix F10, pp. 47a-48a, to conform to the amendment to Art. VI of the Illinois Constitution, and the C.P.A. secs. 76(1) and (2). This Court will not make the violent pre-

sumption that the Illinois appellate courts, having made correct rules 301 and 303 long before appellants even filed their Notices of Appeal, construed Rule 35 contrary to them. It must follow that (1) they considered the federal questions presented to them, or (2) chose to ignore them.

It remains only to examine the appellees' cases. If Rule 35 was inapplicable, the contention that appellants failed to "prosecute" the remedy under the 1 year rule loses its force. Appellees claim (p. 9, middle of page) that appellants Hettleman and Edmunds were guilty of culpable negligence by waiting from October 4, 1966 when the Appellate Court denied their motion to reconsider dismissal of their Notices of Appeal, or from January 11, 1967 when the Appellate Court denied their motion to vacate, to January 24, 1967 when they filed their petition in #51962 for leave to file their notice of appeal. In addition to doing the needed research and time taken to prepare the necessary documents, appellant Hettleman, on whom rested most of the burden since Professor Edmunds is 77 and carrying a full load teaching law, was defending their rights by assisting in the preparation of the Black et al

72 page Brief and Argument(P. 41,bottom of Jurisdictional Statement). Appellees must be quite desperate to charge laches under the above time table.

Page 15 of appellees' Motion to Dismiss concludes that the refusal of the Ill. Supreme Court to certify its ratio decidendi proves its decision rested on the alleged non-compliance with Rule 35. Its refusal was most likely due to a premature request. Since applellants had not at that time even filed their Notice of Appeal to this Court,how did the state court know vel or non their would be a request for review? If its intent was to dodge the federal questions presented to them indisputably,what other action could have been expected from it?

The cases cited by appellees will be discussed in the order of their appearance. At p. 13, Des Moines v. City Ry., 214 U.S. 179(1909) is cited for the proposition that the Cook County Board's resolutions are not ordinances,or state statutes. Mr. Justice Holmes held for the Court that,under Iowa laws,the"resolution" was a denial only of the Ry's claim,and did not dignify it as an "ordinance". It is to be noted that Des Moines is a municipality,and not a quasi-municipality as is

Cook County. The distinction between them, and the Illinois law is stated clearly in The County of Cook v. The City of Chicago, 311 Ill. at 239-240:

> "A municipal corporation is created principally for the advantage and convenience of the people of the locality. County and township organizations are created in this State with a view to aid in carrying out the policy of the State at large for the administration of matters of political government, finance, education, taxing, care of the poor, military organizations, means of travel, and the administration of justice. The powers and functions of county and township organizations, therefore, as distinguished from municipal corporations, have a direct and exclusive bearing on and reference to the general, rather than local, policy of government of the State" (citing cases in Ala., Ky., N.C., Ohio, Wisconsin, and in 1 Dillon, 4th ed., sec. 23). This Court has made the same distinction.

On Nov. 5, 1965, an appeal was filed in the Appellate Court, Chicago, from a summary judgment holding against the contention of one Moseid that the amendment of 1963 to the Counties Library Act, c.81, s.81 was unconstitutional because a $1.00 tax, called a "fee", was imposed upon him, under that amendment, as a defendant filing his appearance the alternative to payment of which was default. Since Moseid, a defendant in a small claims suit, was obliged to come into court against his will, he presented the federal question of whether the amendment was constitutional as denial of due process.

The Appellate Court has pigeon-holed the case, Chicago style, which may eventually come to this Court as another related case.

Mr. Hladis, whose name appears on the appellees' Motion to Dismiss, took the opposite view in Moseid. Page 2 of his brief there stated that Cook County's theory of the case was that the $1.00 may be exacted tho the library was on paper only:

> "it is sufficient that the passage of the County ORDINANCE creating such library has been accomplished."

Again, at p. 11, referring to the meaning of "establish", he stated:

> "The normal meaning of the term "establish", coupled with the formal establishment of such a library by a County ORDINANCE of September 30, 1963, satisfied the legislative intent which forms the basis for allowing collection of the library fee."

Murder will out! That appeal will probably remain pigeon-holed indefinitely since the Ill. Supreme Court is not likely to grant a petition for mandamus.

At pages 14-15 are grouped cases decided by this Court where state courts have not passed on federal questions. Since it has been established that the Ill. courts had such questions presented to them and passed on them in the trial court, and likewise in the app-

ellate courts necessarily, since it will not be presumed they dodged them deliberately, the cases are irrelevant. Review has been granted or denied where the record was clear to a fading range into the mystic where this Court has been divided, at times sharply by 5 to 4. In Kregger, the complaint, to recover from an attorney fees paid allegedly on the attorney's representation that he would obtain the convicted plaintiff a new trial, was brought in the Federal Court under the Civil Rights statute to avoid dismissal for want of diversity. The attorney was not a "state officer" and the complaint nowhere specified any federal claims which makes it easily distinguishable from the recitals in the Jurisdictional Statement. In Lynch, Pierson, a N.Y. resident was taxed under its income tax law on rental income from Ohio realty. The Appellate Division of the N.Y. Supreme Court annulled the tax without stating the grounds of its decision. The N.Y. Court of Appeals affirmed without opinion. Pierson contended the 14th amendment was violated. Review was refused because unlike in the case at bar, appellant did not even try to get the equivalent of a certificate as to the grounds. Adams involved the question whether "good time" could

betaken off the minimum sentence under the Michigan Indeterminate Sentence Act. The Michigan Supreme Court held it must be taken off the maximum sentence. This Court refused to review because here was a clear case of the substantial state question. In Woods, Illinois law provided no appellate review by habeas corpus application, unless jurisdiction over the subject matter and the parties had been raised, which Woods did not do upon filing such an application more than 5 years after the judgment of conviction. An 1945 Illinois statute provided a substitute for the writ of error, if taken within 5 years of such judgment. This Court refused to to review on an unambiguous state statute which was the basis for the Supreme Court's decision. It suggested, however, he go back and raise federal questions, and to come back if the limitation period was then held against him and all remedies at all times were denied him, for where imprisonment violates the U.S. Constitution, "the federal courts would be available to provide a remedy to correct such wrongs." No clear non-compliance with a state statute, but with an ambiguous improper court rule 35, was involved, as in the case at bar. Appeal was the proper remedy sought unquestionably by appellants.

Phylefollowed Woods. The State law gave the prison warden power to have a jury decide a prisoner's insanity. He exercised such power for Woods awaiting execution. Found insane,he was transferred to the State Hospital. Its Medical Superintendent,18 days later, certified him sane. Phyle brought habeas corpus instead of mandamus. The California Supreme Court held he could have applied again to the warden. Review by this Court was refused because the state law on which the decision was based did not admit of any ambiguity,which existed in the case at bar,on the view most favorable to the appellees. This Court was divided 6 to 3 in Durley. Durley raised the federal question of conviction on perjured testimony for the first time in a petition for rehearing,on denial of his second petition for habeas corpus before the Florida Supreme Court. This Court held that the state court mighthave passed on the federal question previously and refused to review,therefore,on the ground of res judicata which was not involved in the case at bar. A variation of the quotation from Adam (p. 25 of this Reply)appears on p. 82:"..it is likewise well settled that,if the independent (state) ground was not a substantial or sufficient one,'it will be presumed that the State court based its judgment on the law raising the federal question,and this Court will then take jurisdiction."

There can be no doubt from the Record that appellants raised federal questions in the Illinois courts.

Durley had followed Stembridge whose motion for a new trial was denied because the prior contradictory statement was impeaching evidence only and the Ga. Code did specifically deny a new trial on such ground. His motion for a rehearing raised the 14th amendment for the first time in the intermediate appellate court which then amended the Record to show that federal questions were necessarily passed upon in denying the motion for rehearing. Instead of asking the Ga. Supreme Court to review the amending order, a petition for certiorari was filed in this Court which denied it because it was clear the state's highest court never passed on the federal question which is not true in the case at bar, as appellees have several times admitted federal questions had been presented to the Illinois courts and found to be without merit. Even so, 3 members of this Court dissented. Ellis was given no reason for denial of the use of the Yonkers public school building for a forum on "peace and war." The N.Y. Education Act provided that each Board of Education could make rules for the use of school property for civic forums and community centers.

Ellis' petition got nowhere in the N.Y. courts for the reasons stated that it did not state that other similar organizations were denied permits(tho the affidavit supporting the motion for leave to appeal did so state,but no effort was made to amend the petition). This Court refused to review on a 5 to 4 vote because the petition was too vague to determine if its denial was based on a federal or state question. Can there be any doubt that the Answers and the Motions/and the Counteraffidavits in the Records in the case at bar set out fully the circumstances of the conspiracy between the appellees to take the personal and property rights of the Institute and its members for a public use without any compensation,in violation of Article I,sec. 10 of the U.S. Constitution and amendments 4,5,14(1) thereto?

Ellis relied on Wechsler, a resident of Illinois, who was hurt by a railroad train in a certain Missouri county but sued in Jackson County,Missouri,contrary to General Order 18-A issued under the 1920 Transportation Act. The Director General of Railroads filed his appearance and,as permitted under Missouri practice, pleaded to the jurisdiction and defended on the merits.

It was held that, since Order 18-A went to the venue only, it was waived by the defendant's appearance. The Missouri courts affirmed judgment for Wechsler. This Court reversed because the state courts, according to its opinion, thru Mr. Justice Holmes, may deal with procedure as they think proper in local matters, but they cannot treat it as defeating a plain assertion of federal right. This case would seem to support appellants, that a state court decision resting solely on procedure will not be respected always where a clear federal right has been presented.

Page 17 of appellees' motion cites 4 cases for the proposition that, if a decision is based on an independent and adequate state statute, it is not to be presumed the decision was made to evade federal questions. If it has been established that the decision in the case at bar rested on both the federal questions and the non-compliance with Rule 35, but it has also been established that the Court had no right to rely on Rule 35 because appellees' construction of it, adopted by the Court, contravened the Ill. C.P.A., secs. 2, 4, and 76(1) and (2), abridging the statutory right to 30

days, it will not be presumed, as appellees state on pages 17-18 of their Motion to dismiss, that the state courts' judgments were based on Rule 35. Thus, in Nickel:

On March 26,1913, Nevada passed a law taxing any transfer in contemplation of death. On April 17,1913, a California resident(who owned most of the stock in a Nevada corporation which owned a California corporation which owned sizeable property in Nevada) made an irrevocable trust with himself as beneficiary for life, and, after his death, upon limitations similar to his will executed at the same time. He died on October 14,1916. The Nevada Controller sued successfully to collect the transfer tax. The Estate argued that, since the Act did not take effect till April 26,1913, and the remaindermens' interest vested on April 17,1913, no tax was due. The Nevada Supreme Court held that the execution of the deed and will were one transaction. No right, hence, vested till the California resident's death. Writ of error to this Court was denied because the Nevada tax statute was properly passed upon by the Nevada court. Although Mr. Justice McKenna dissented, this is not a mystic, but a clear example of a decision on a substantial Nevada statute, and not on an unreasonable, ambiguous and

contradictory court rule. Nor was there any claim that the Nevada decided as it did to evade a federal question. Wolfe was decided by 5 to 4. The N.C. Supreme Court held that, as a matter of state law, it did not have before it in the Record, which was disputed by the dissent, the findings and judgment of the federal court which enjoined barring negroes from a semi-public property because they were negroes, and not because they were guilty of the N.C. criminal trespass law. This Court refused to review the N.C. courts' decisions on their evidentiary laws which, in the case, were regarded as reasonable and not frivolous. Mims turned also on state rules of evidence and pleading. The evidence at the trial showed the train Mims, a car inspector, was crossing the track to inspect when a switching engine ran him down and killed him, was a local freight train, run habitually and on the morning he was killed, in S.C. After the plaintiff rested, the RR., without having first sought to amend their pleading, unsuccessfully tried/to introduce evidence that the freight train was in interstate commerce and that the Federal Employers Liability Act was applicable. The Florida Supreme Court affirmed judgment for the plaintiff. This Court re-

refused review because any federal claim must be set up at the proper time and in the proper manner of pleading. The federal claims of the appellants were repeated over and over again in their answers, motions to dismiss the amended complaint and the affidavits supposed to support the motion for summary judgment, and in their counteraffidavits, in their oral arguments and in their petitions and briefs. But appellees have sought to lessen or destroy substantive federal rights and defenses by mailing a "Notice of a Notice of a Notice of Appeal" to appellants for which no authority existed in Rule 35, or elsewhere, and claiming non-compliance in 10 days which contravened the 30 day statutory right with which the Rule 35 was inconsistent and hence, legally, as if it never existed. At the time Parker was convicted, the Illinois Constitution, Article VI, Judicial Department, forbade an appeal first on federal questions, or otherwise, to the Appellate Court, if one wished to present them to the Ill. Supreme Court. This Court refused to review on a 6 to 3 vote. The dissent argued that Parker was protected by his first appeal to the Supreme Court, and denied he waived his rights by asking the Appellate Court to decide state questions.

If appellee are contending by the citation of Parker, that appellants Hettleman and Edmunds waived the right to present federal questions to the Supreme Court by first seeking review in the Appellate Court, what about Jones and the amendment to Article VI of the Ill. Const. which permitted it?

To support their contention that failure of appellants to respond to the "Notice of a Notice of a Notice of Appeal" by appellee, the Institute, Arkema and O'Brien, was jurisdictional, appellee cite Cutler and School District at page 18 of their Motion to Dismiss. These were decided before the 1965 amendment to the C.P.A., sec. 76(2) which states plainly that all steps other than filing the Notice of Appeal in the trial court shall be procedural. (Appendix F8, pp. 45a). Cutler involved a cross appeal issue when he was served properly by the adverse party with a Notice of Appeal and not by an agent mailing advice thereof by a paper called "Notice of a Notice of Filing a Notice of Appeal." The same situation arose in the 1934 case of the School District and failure to file a cross-appeal upon getting a Notice of Appeal, not a "Notice of a Notice of the Filing of a Notice of Appeal" by an unauthorized party, was jurisdictional

then.

Pages 18-19 of the appellees' Motion to dismiss contain the last 3 of 19 cases cited by them. The first 2 of the3 attack appellants failure to "perfect" their appeals. They must be reminded again that,since January 1,1966, or about 8 mos. before appellants filed their Notices of Appeals, an appeal was perfected by the simple act of filing in the trial court a Notice of Appeal,assimilating the Illinois practice to Federal practice(Appendix F8d(2),p. 452;F11,p. 48a). In Schwind, Forester mistakenly filed a Motion for a New Trial which the Court treated as a Motion to Vacate,instead of an Petition for Leave to Appeal. Forester played fast and loose,trifling with procedural rules and otherwise acting in bad faith. After his motion for a new trial or to vacate the decree, on April 30,1936, he filed a Notice of Appeal ,but did not follow through with filing bond,as directed, nor filing transcript of proceeding within the time,or at all,nor filing a report of proceedings,then moved ,on July 3,1936, moved to strike his own appeal from the order denying his motion for a new trial. He had,in short,failed to prosecute his appeal. No such failure can be properly charged, on the Record, to the appellants.

In Roy, leave to file an appeal was denied because appellant knew actually, on July 6,1935, when it came to the Court Clerk's office with the transcript of record that July 29,1935 was the last day the court rules permitted filing it;when, on July 16,1935,it was withdrawn to prepare the Abstract of Record and a bill for the filing fee was handed it. The transcript was not filed timely,and a lawyer of the experience of the City attorney and of ordinary prudence should have been diligent enough to have had a messenger at the least bring the transcript back to the Clerk's office. Roy is cited to prove a comparable situation in the failure of Hettleman,pro se and as attorney for Edmunds in receipt,during his absence from the City under the circumstances recited on pages 40-41 of the Jurisdictional Statement, of the "Notice of a Notice of Filing a Notice of Appeal" to respond on or before July 25,1966,although he knew nothing of the existence of that paper till his return to Chicago on August 3,1966. To what extreme will not appellees go to shore up a defenseless position.

At page 41 of the Jurisdictional Statement are cited 4 cases,of others that could be cited,where the very Appellate Court,First District,and the Ill.

overlooked worse derelictions
Supreme Court. In Barbee, Evans, a tenant, received timely notice of the termination of his year to year lease. He disavowed knowledge of the notice till some long time after he saw it in his desk. His eviction was reversed. In Chicago Cosmetic Co., its application for injunction was denied and it filed a Notice of Appeal. The City of Chicago moved to dismiss the appeal because Cosmetic had not served its coparties with copies of their Notice of Appeal under the Rules. Held, since their coparties would not be adversely affected by a reversal of the decree, Cosmetic was under no duty to serve their co-parties. It Has been the appellants' contention, in all the proceedings in the Illinois appellate courts, that Black et al. were under no duty to serve their coparties with a Notice of Appeal, and a fortiori appellees, the Institute, Arkema and O'Brien, had neither the duty, nor the right, to serve a "Notice of a Notice of Filing a Notice of Appeal" (they certainly had no right, as the completely victorious party to file a Notice of Appeal). How, then, could Rule 35, even if it did not contravene the 30 day statutory period, come into play, and support the courts' decisions on that procedural rule?

To the same effect was Pieczyski, which relied on Chicago Cosmetic Co. In Matanky, the statute then permitted service of Notice of an Appeal up to 90 days from the entry of the judgment. Service beyond the 90 days was excused because no one was prejudiced by the delay.

The final case cited, Cutter Labs, at p. 19 of appellees' Motion to Dismiss, belongs properly with Wolfe and the other cases on p.17, cited for the proposition that a state decision on independent and adequate nonfederal questions deprives this Court of jurisdiction to review. Cutter was decided 6 to 3. The California Supreme Court upheld Mrs. Clark's discharge from her job on the ground that she was a member of the Communist Party and not for her union activities in which federal law protected her, as the Arbitration Board held. Its scope under the California Arbitration Act was held to be for California to decide.

CONCLUSION

The Motion to Dismiss contains so many straw men, errors in citing wrong statutes and cases, catch phrases and paradoxes that it is entitled to little weight, and has placed a great and needless burden on counsel and this Court. The presentation of fed. quests..has been admitted.

Respectfully submitted,

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